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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JOSE S.,

Petitioner,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

LOS ANGELES COUNTY DEPARTMENT
OF CHILDREN AND FAMILY SERVICES,

Real Party in Interest.

B197039

(Super. Ct. No. CK20683)

ORIGINALPROCEEDING; Petition for writ of mandate. Robert Stevenson,
Referee. Petition granted.

Pamela Rae Tripp for Petitioner.

No appearance for Respondent.

Raymond G. Fortner, Jr., County Counsel, and Frank J. Da Vanzo, Deputy County
Counsel, for Real Party in Interest.

Earl Baker for the Minor.

Petitioner Jose S., the presumed father of Juliet C. (Juliet), filed a petition for extraordinary relief pursuant to California Rules of Court, rule 8.452, seeking review of the juvenile court's February 20, 2007 order setting a Welfare and Institutions Code section 366.26¹ permanency planning hearing for Juliet.

The parties submitted a stipulation that requested that we grant the petition, reverse findings and orders made with respect to the father at the July 20, 2007 dispositional hearing, as well as the February 20, 2007 section 366.21 six-month review hearing that terminated reunification services to the father and set a section 366.26 hearing. They also requested that no findings and orders regarding the mother be affected by the stipulation, and that this court immediately issue a remittitur.

We accept the stipulation and grant the petition.

FACTUAL AND PROCEDURAL BACKGROUND

The May 25, 2006 Detention Hearing

On April 17, 2006 the Los Angeles County Department of Children and Family Services (DCFS) initiated a dependency investigation regarding newborn Juliet, who had been born premature and with methamphetamine in her system. Jose S. was identified as Juliet's alleged father. Shortly after Juliet's birth, the father participated in a team meeting with DCFS at which he agreed to attend AA meetings twice a week to address his drinking problem and to find a reliable babysitter for Juliet while he was at work and the mother was in a residential substance abuse treatment program. The father also submitted to a drug screen at DCFS's request.

After learning more about the parents' history, DCFS filed a March 24, 2006 petition on behalf of Juliet, under section 300, subdivisions (b) and (j). The petition alleged that Juliet had been exposed to methamphetamine, her father abused alcohol and had a criminal history, and her mother had failed to reunify with four of Juliet's siblings,

¹ All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

who had been juvenile court dependents. DCFS recommended that Juliet be detained and that she be placed in shelter care.

By the May 24, 2006 detention hearing, Jose S. was in custody, facing a parole violation charge that stemmed from a May 8, 2006 drug arrest.

DCFS submitted an order for Jose S. to appear at the detention hearing, but neither he nor the mother appeared. The juvenile court continued the matter one day, to May 25, 2006, appointed counsel for the mother and Juliet, found that notice of the proceedings had been given as required by law, and ordered Juliet, who remained hospitalized, detained. The juvenile court found Jose S. to be Juliet's presumed father, ordered DCFS to submit a jail removal order for him for a June 21, 2006 jurisdictional hearing, ordered DCFS to provide both parents referrals for drug testing and counseling, and granted both parents monitored visitation.

A few days after the detention hearing, DCFS gave the father referrals for drug counseling, alcohol testing, and parenting classes in Spanish.

On June 15, 2005 DCFS personally served the father with a notice of a June 21, 2006 hearing on the petition.

The June 21, 2006 Hearing

June 21, 2006 was the date set for a pretrial resolution conference and jurisdictional/dispositional hearing.² By this time, Juliet had been released from the hospital, was in foster home placement, and DCFS was investigating the father's sister's home as an alternative placement. The DCFS report for the hearing showed that the parents had been personally served notice of the hearing at the DCFS office, and that the father had a hearing on his drug possession charges on June 20, 2006. The report also

² There is some confusion in the record regarding the exact nature of this hearing. A prior minute order designates this hearing as a pretrial resolution conference, the notices of hearing refer to it as a "Special/Interim Hearing", and DCFS's report for the hearing refer to it as a jurisdictional/dispositional hearing.

informed the juvenile court of the referrals DCFS had given to the father, his agreement to a case plan, his enrollment in alcoholism and drug dependency program, and his submission to testing at DCFS's behest. DCFS reported that the father visited Juliet and said that he wanted custody of her. The report quoted the father as denying any knowledge of the mother's drug use during her pregnancy, and it gave a new address for the father, apart from the mother.

DCFS recommended against providing services for the mother, who had submitted a waiver of rights to the dependency petition, but favored providing services to the father.

The father did not appear at the June 21, 2006 hearing and was not represented. The juvenile court found that the father had been released from jail,³ and proceeded with the jurisdictional hearing in his absence, finding that he had been properly served.

The juvenile court sustained the allegations in the petition, declared Juliet a dependent, ordered monitored visitation for the mother, ordered DCFS to report on the mother's progress in drug treatment and whether she should be given reunification services, and continued the dispositional hearing to July 18, 2006 for contest. The parties were ordered to return on July 18, 2006 without further notice. The record contains no notice to the father that the June 21, 2006 hearing had been continued to July 18, 2006.

The July 18, 2006 Continued Dispositional Hearing

On July 18, 2006, juvenile the court found that the parties had received appropriate notice, conducted the evidentiary portion of the continued dispositional hearing, and continued argument on disposition to July 20, 2006. On both days, the father was again absent. At the close of the July 20, 2006 hearing, the juvenile court declared Juliet a dependent of the court, ordered DCFS to provide her a suitable placement, and ordered that the father engage in individual counseling to address case

³ The basis for the juvenile court's finding is not stated, but is consistent with the report of personal service of the notice of hearing at the DCFS office, and with a listing of a new address for the father in the jurisdictional report. The dispositional report had listed his address as county jail.

issues, enroll in alcohol and drug counseling and parenting classes, and randomly test. The juvenile court granted both parents monitored visits, and denied reunification services for the mother.

In late August 2006, DCFS finalized plans to place Juliet in the father's sister's home.

On September 19, 2006, DCFS notified the juvenile court that the mother had abducted Juliet and the whereabouts of mother and child were unknown. The court issued a warrant for the mother's arrest and a protective custody warrant for Juliet.

The January 18, 2007 Six-Month Review Hearing

Four months after the abduction, on January 18, 2007, a section 366.21 six-month review hearing was held. The father, in custody, made his first appearance, was appointed counsel, and the court set the six-month review hearing for contest.

DCFS's report for the hearing advised the juvenile court that during the father's incarceration its social worker had communicated with the father through the mail, and that the social worker had been in contact with the father's prison counselor, who stated that the prison was not able to provide the father court-ordered programs, because of his anticipated short stay. DCFS recommended that services to the father be terminated for failure to make substantial progress, and informed the court that searches were underway for Juliet in the U.S. and Mexico. When Juliet was recovered, DCFS planned to place her with the father's sister, who was interested in adopting if the father failed to reunify.

The continued contested section 366.21 six-month review hearing was held February 20, 2007, on the eve of the father's release from prison. The father requested a continuance, contending that because the mother and Juliet were "AWOL in Mexico" the juvenile court lacked "authority" to issue orders other than warrants. The juvenile court, concluding that it had jurisdiction to terminate services to the father and to set a section 366.26 hearing notwithstanding Juliet's abduction, did so, finding that DCFS had provided reasonable reunification services.

In response to the father's objections, the juvenile court noted that it would not be able to proceed with the section 366.26 hearing if Juliet remained missing, and commented that once the father was released he could continue with his court-ordered programs and file a section 388 petition to reinstate reunification services. The juvenile court explained that Juliet was under the age of three, the father had had eight and a half months of reunification services, he had not visited with Juliet since his incarceration, and that it was in Juliet's interest to set the 366.26 hearing, so that the court could proceed with a permanent plan without delay once Juliet's physical custody was recovered.

The Petition for Writ of Mandate and the Parties' Stipulation

The father filed a petition for writ of mandate under California Rules of Court, rule 8.452, in which he contended that the juvenile court had erred in conducting the jurisdictional hearing on June 21, 2006, when he was incarcerated, without counsel, without a waiver of appearance.⁴

In response to our order to show cause, DCFS, the father, and Juliet's attorneys ("the parties") entered into a joint stipulation that requested that this court grant the father's petition and order the juvenile court to vacate its dispositional and six-month review hearing findings and orders with respect to the father, and continue matters until Juliet was located.

DCFS provided evidence that on June 20, 2006, its social worker had been informed that the father had received a 16-month state prison sentence for possession of

⁴ The father argued, as well, that the juvenile court had erred in issuing orders at the six-month review hearing, because the mother and child had absconded to Mexico, and their whereabouts were unknown. He contended that the court lacked authority to issue substantive orders until Juliet was recovered, and asserted that even if the court had such authority, it had erred in finding that he had received reasonable reunification services, because visitation is an essential element of reunification, and had been thwarted by the abduction.

methamphetamine for sale, the social worker had prepared a last minute court report to that effect and had faxed it to the juvenile court the morning of the June 21, 2006 hearing, with instructions that the report be held until the July 18, 2006 hearing, but that report had not been brought to the court's attention or filed in the case record.

The parties agreed that the father "was in custody and should have been brought to court and been appointed counsel prior to the disposition orders made on July 18, 2006 by the juvenile court." The parties stipulated that the juvenile court should not have held a dispositional hearing on July 18, 2006 without the father's appearance, representation by counsel, or waiver of appearance, and they agreed that this court should therefore reverse the findings and orders made with respect to the father at the dispositional and six-month review hearings. They also stipulated that due to the mother's alleged absconding with Juliet, which had thwarted the dependency proceedings, Juliet would not be prejudiced by reversal of the juvenile court's orders.

DISCUSSION

The parties' stipulated request for a reversal does not lead inevitably to a reversal order.

"An appellate court shall not reverse or vacate a duly entered judgment upon an agreement or stipulation of the parties unless the court finds both of the following: [¶] (A) There is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal. [¶] (B) The reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pre-trial settlement." (Code Civ. Proc., § 128, subds. (a)(8)(A) & (B).)

I. Code of Civil Procedure Section 128, Subdivision (a)(8) Is Applicable to an Order Terminating Reunification Services and Setting a Section 366.26 Hearing

A threshold issue in considering the effect of the parties' stipulation is whether Code of Civil Procedure section 128, subdivision (a)(8), applies to the dispositional and

review hearing orders, i.e., whether each of these orders constitutes a “judgment” within the meaning of the statute. In *In re Rashad H.* (2000) 78 Cal.App.4th 376, Division Five of this court impliedly found an order terminating parental rights at a section 366.26 hearing to be a judgment within the meaning of Code of Civil Procedure section 128, subdivision (a)(8), accepting a stipulation that provided for reversal due to defective notice to the father. There is no apparent case law, however, that addresses whether an order challenged in a petition for writ of mandate under California Rules of Court, rule 8.452 (or its predecessor rules) comes within the purview of Code of Civil Procedure section 128, subdivision (a)(8). Our review of the legislative history of amendment to Code of Civil Procedure section 128 that enacted subdivision (a)(8) (Stats. 1999, ch. 508, § 1), leads us to conclude that “judgment” within the meaning of that provision includes appealable findings and orders of trial courts, and therefore encompasses the orders at issue here.

II. The Juvenile Court Need Not Have Committed Reversible Error

Reversible judicial error is not a necessary prerequisite to a stipulated reversal under Code of Civil Procedure section 128, subdivision (a)(8). (*Union Bank of California v. Braille Inst. of America, Inc.* (2001) 92 Cal.App.4th 1324, 1330-1331.) Consequently, although: the father had actual notice of the June 21, 2006 dispositional hearing; procedural issues related to the jurisdictional and dispositional hearings are waived because the father failed to raise them at his first appearance (*In re Wilford J.* (2005) 131 Cal.App.4th 742, 754; *In re B.G.* (1974) 11 Cal.3d 679, 689); and violation of Penal Code section 2625 is not per se reversible error (*In re Jesusa V.* (2004) 32 Cal.4th 588, 624, 635), consideration of the parties’ proposed stipulated reversal is nonetheless proper.

III. Code of Civil Procedure Section 128, Subdivision (a)(8) Is Satisfied

Our independent review of the record, the father's petition, the parties' stipulation, and the cited authority leads us to conclude that we should accept the stipulation for reversal.

The first factor of Code of Civil Procedure section (a)(8)(A), that "[t]here is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal," is satisfied. Juliet's former foster parents have no interests that could be adversely affected, because Juliet was abducted just as she was about to be transferred from a foster home to the home of her paternal aunt. There are no pre-adoptive parents.

There is no reasonable possibility that reversal will adversely affect the interests of the public, because the stipulation does not affect the jurisdictional findings or orders, or orders issued at the dispositional and review hearings that pertain to the mother. The public's interest in reuniting dependent children with their parents is fostered by the stipulation, because the possibility of reunifying Juliet with her father is greater with the stipulated reversal than without it. Under the particular facts of this case, where the father complied with a reunification plan until lack of services during his incarceration precluded him from continuing to do so, and visitation, a critical component of reunification (*In re Mark L.* (2001) 94 Cal.App.4th 573, 580) has been stymied by Juliet's abduction, the juvenile court has no reason to do anything but issue warrants for the abducting parent's arrest and await the child's return. (*In re Jean B.* (2000) 84 Cal.App.4th 1443, 1446.)

The second factor to be found under Code of Civil Procedure section 128, subdivision (a)(8)(B), that "[t]he reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement," is also satisfied in this instance. According to the parties' stipulation, the father's rights under Penal Code section 2526 were unknowingly violated by lack of notice of the July 18, 2006 continued dispositional hearing, and by his consequent

absence from and lack of representation at that hearing and the one that followed it. The public's interest in assuring that incarcerated parents are afforded meaningful access to the courts with respect to dependency matters is served by the stipulated reversal. Dependency proceedings are confidential, but the circumstances surrounding this stipulation, if known, would foster, rather than erode, the public trust in the integrity of dependency adjudications.

Finally, we discern no basis for concluding that the availability of stipulated reversal under these particular circumstances would reduce the incentive for pretrial settlement. Code of Civil Procedure section 128, subdivision (a)(8) is therefore satisfied in all respects.

DISPOSITION

The petition for writ of mandate is granted, the order to show cause is discharged. Respondent is directed to vacate findings and orders made at the July 20, 2006 dispositional hearing and February 20, 2007 section 366.21 review hearing as to the father, and to continue the matter until such time as Juliet is located. The remittitur shall issue forthwith.

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_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

CHAVEZ